

**REMARKS**

Claims 12-17, 19 and 21-33 are pending in the present application. Claims 22-31 are withdrawn from consideration. Claims 12-17, 19, 21, 32 and 33 are rejected.

Claim 32 has been amended to more clearly describe and distinctly claim the subject matter the Applicants consider their invention. Specifically, claim 32 has been amended to recite that the lipophilic extract is present in the composition in an amount effective to treat UV-A and/or UV-B damaged skin. Support for the amendments is found at least at page 19, lines 12-19; page 23, lines 1-3; page 23, lines 8-12; page 23, lines 22-25; and page 26, last paragraph-page 27, line 2, of the Substitute Specification as originally filed.

The recitation of "page 42-43; page 10/lines 25-29" in claim 32 has been deleted as requested by the Examiner.

No new matter has been added by this amendment.

**Claim Rejections – 35 U.S.C. § 103**

1. Claims 12, 13, 19, 32 and 33 are rejected under 35 U.S.C. § 103(a) as allegedly unpatentable over Charrouf et al (Triterpenes and sterols isolated from the pulp of *argania spinosa* (L.), Sapotaceae, Plantes Medicinales et Phytotherapie 25 (203), 112-117, 1991) in view of Laigneau et al. (FR 2692783). According to the Office Action, Charouf et al teach triterpenic alcohols and sterols isolated from the unsaponifiable fraction of the pulp's lipidic extract of *Argania spinosa*, and these compounds are lupeol, beta and alpha-amyrines, etc. Charrouf et al also teach that the pulp of the fruit is ground and the lipids are extracted with hexane. The unsaponifiable fraction of the hexane extract is isolated according to the method described at page 2, fourth paragraph. Charrouf et al do not teach a method of treating skin damaged by UV-A comprising the lipophilic extract from the pulp of *Argania spinosa* fruit, and at least one dermatopharmaceutical auxiliary and/or additive. Laigneau et al is therefore joined for teaching a composition containing the unsaponifiable fraction of sesame oil (a dermatopharmaceutical auxiliary) mixed with unsaponifiable fractions from any oil. The compositions are used for application to the skin, and pharmaceuticals are used to

prevent or treat the effects of UV-A on the skin. It allegedly would have been obvious to combine unsaponifiable fraction of sesame oil from Laigneau et al and the triterpenic alcohols and sterols isolated from the unsaponifiable fraction of the pulp's lipidic extract from Charrouf et al to treat the effects of UV-A on the skin since Laigneau et al teach a composition for treating UV-A effects mixed with unsaponifiable fractions from any oil, especially a vegetable oil. It is asserted that this would motivate one of ordinary skill to add the lipidic extract of *Argania spinosa* (an unsaponifiable fraction of a vegetable oil) to the composition of Laigneau et al to achieve a UV-A treating composition, with a reasonable expectation of success.

Applicants respectfully traverse this basis for rejection.

In rejecting claims under 35 U.S.C. § 103, the Examiner must establish a factual basis to support the legal conclusion of obviousness. See *In re Fine*, 837 F.2d 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). To establish a *prima facie* case of obviousness, all the claim limitations must be taught or suggested by the prior art. See *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). Furthermore, although the analysis need not identify explicit teachings directed to the claimed subject matter, "it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does." *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 USPQ2d 1385, 1396 (2007). As such, "there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *Id.* (quoting *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006)).

Independent claim 32 has been amended to clarify that a UV-A and UV-B treating effect is provided by the lipophilic extract from the pulp of *Argania spinosa* fruit. Neither Charrouf et al nor Laigneau et al. recognize that the extract of the fruit of this particular plant has such properties. Laigneau et al. disclose that for treating effects of UV-A, both the sesame oil concentrate and the wheat germ oil concentrate are needed, as either concentrate alone is ineffective:

"The inventors also found that, of equally unexpected way, the above composition mentioned consists of the combination of the two concentrates, is

active not only as a preventive or immediate against the effect of UVA, but also in the curative effects of UV-A rays while vitamin E and the two mentioned above concentrates only have almost no or no action against these effects.” *Page 4 of the translation.*

It is clear from the disclosure of Laigneau et al that the unsaponifiable fraction of sesame oil when mixed with the unsaponifiable fraction of another vegetable oil such as wheat germ oil provides the activity necessary to treat UV-A damage of the skin. Contrary to the assertion of the Office Action, one skilled in the art would not have considered it obvious to use a lipophilic extract from the pulp of *Argania spinosa* fruit in an amount effective to treat UV-A and/or UV-B damaged skin in the composition of Laigneau et al, because the compositions of the reference already provide such treatment. *See Ex parte Rinkevich*, Appeal No. I2007-1317, for US Pat. Appl. No. 09/731,623, no US Pat. No. 7,356,704 (BPAI 2007) (“In the instant case, we conclude that a person of ordinary skill in the art *having common sense* at the time of the invention would not have reasonably looked to Wu to solve a problem already solved by Savill. Therefore, we agree with Appellants that the Examiner has impermissibly used the instant claims as a guide or roadmap in formulating the rejection.”)

Further, the claim limitation of “a lipophilic extract from the pulp of *Argania spinosa* fruit in an amount effective to treat UV-A and/or UV-B damaged skin” is not taught or suggested by the combination of Charrouf et al and Laigneau et al. *See In re Royka, supra*. Neither reference recognizes such properties in the claimed extracts. The necessary reason to combine the references in the way proposed by the Office Action is therefore absent from the rejection.

*Prima facie* obviousness has therefore not been established for claim 32.

Claims 12, 13, 19 and 33 depend directly or indirectly from claim 32. Where an independent claim is valid over cited art, *a fortiori* any claim dependent therefrom must also be valid over the same art. *See Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1576 n.36 (Fed. Cir. 1987). As such, *prima facie* obviousness has also not been established for claims 12, 13, 19 and 33.

Withdrawal of the rejection of claims 12, 13, 19, 32 and 33 is therefore respectfully requested.

2. Claims 12-17, 19, 21, 32 and 33 are rejected under 35 USC 103(a) as allegedly unpatentable over Charrouf et al and Laigneau et al as applied above, and further in view of Charrouf et al 2 (EP1213025A1). Charrouf et al 2 is cited to provide the teaching of percentages of extracts or auxiliaries and additives of claims 14-17 and 21, which is not taught by the primary references.

As claims 14-17 and 21 are the only claims that recite such percentages, applicants believe this rejection is intended to be applied only to claims 14-17 and 21. The deficiencies of Charrouf et al and Laigneau et al with respect to the claimed invention are discussed in detail above. The addition of Charrouf et al 2 does nothing to remedy these deficiencies. As such, the combination of references cannot render the claimed invention obvious. *See In re Rijckaert*, 9 F.3d 1531, 1533 (Fed. Cir. 1993). Withdrawal of the rejection is respectfully requested.

### **CONCLUSION**

It is believed that claims 12-17, 19 and 21-33 are now in condition for allowance, early notice of which would be appreciated. No fees are believed due with this submission. If any fees are due at this time, the Commissioner is authorized to charge Deposit Account No. 50-3329. Please contact the undersigned if any further issues remain to be addressed in connection with this submission.

Respectfully submitted,

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